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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION, Plaintiff v. UNIVERSAL EXPRESS, INC., et al., Defendants.	: : : : : : : : :	1:04-cv-02322 (GEL)

PLAINTIFF'S SUMMARY OF EVIDENCE
THAT ESTABLISHES ALTOMARE IS IN CONTEMPT

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When one cuts through the web of disinformation cast by Richard Altomare, he has failed to meet his burden of demonstrating his financial inability to comply with the Court's order entered on March 8, 2007, which required him to disgorge $1,419,025 in ill-gotten gains and pay $283,073 in prejudgment interest. The evidence presented at hearing on February 4, 2008, at which Altomare testified, conclusively demonstrates that Altomare remains in contempt of the Court's order. Since July 1, 2006, at least $3,805,366 has passed through Altomare's accounts, yet he made no effort to pay any amount toward the judgment until after the first contempt hearing on October 12, 2007.[1] Even then, his payments totaling $60,000 bear no rational relationship to his income, apparent collection of assets, and ability to raise more than $3.8 million.

As discussed in detail below, Altomare has failed to account for massive income and related dispositions of over $3.8 million in the past eighteen months:

- Altomare received at least $1,020,000 in compensation from Universal Express between July 1, and December 31, 2006 in the months preceding entry of the judgment, but provided no evidence on the disposition of these funds.
- Altomare paid $100,000 on November 3, 2006 to purchase a condominium but provided no explanation of the source of these funds.
- Altomare obtained $160,466 from a second mortgage from Washington Mutual on the condominium on or about January 30, 2007, but provided no records showing the disposition of these funds.
- Altomare received $1,745,000 in compensation from Universal Express between January 1, and December 31, 2007, of which approximately $1,427,882 was received after entry of the judgment on March 8, 2007.
- Altomare has failed to disclose the sources of at least $491,275 in deposits into his Wachovia bank account during 2007.

[1] As discussed in more detail below, during the past eighteen months Altomare received at least $3,805,366, which is comprised of $1,020,000 in compensation received from Universal Express since July 1, 2006**;** $100,000 in money paid on condo closing; $1,745,000 in compensation received from Universal Express during 2007; $160,466 from the Washington Mutual second mortgage on the condominium; $164,900 from the Wachovia credit line; $570,000 from the jewelry sales in September 2007; and $45,000 in cash advances.

- Altomare and his wife have paid at least $366,890 to remodel and furnish the condominium since March 21, 2007.
- Altomare withdrew $164,900 from the Wachovia credit line after entry of the judgment on March 8, 2007.
- Altomare received cash advances of at least $35,000 and $10,000 on July 24, and August 8, 2007, but did not use these funds to pay the judgment.
- Altomare sold $571,000 in jewelry on September 24 and 25, 2007, after the Court's entry of the Opinion and Order finding him in contempt on August 31, 2007, but he used none of those funds to pay the judgment.
- Altomare has failed to account for other assets which he could use to satisfy the judgment, including $3,000,000 in jewelry, $3,000,000 in art, and $7,000,000 in cash surrender value of a life insurance policy.

Despite his claim of insolvency, Altomare continues to live a lavish lifestyle inconsistent with his professed state of poverty. To the contrary, his actions indicate he has other sources of income which he has not disclosed to the Court. In light of his failure to provide evidence of all his sources of income, detailed records for all of his bank accounts, and a full sworn accounting of the disposition of more than $3.8 million during the past eighteen months, Altomare remains in contempt of the Court's order. He has not met his burden of establishing categorically and in detail that compliance with the Court's order is impossible. Therefore, the Court should incarcerate Altomare until he pays the full amount of disgorgement and prejudgment interest, or otherwise purges his contempt by demonstrating, in compliance with his burden, his incapacity to pay the judgment by providing a full sworn accounting supported by third-party documentation showing the sources of all of his receipts and disbursements of funds since July 1, 2006.

I. Altomare Has The Burden Of Establishing His Substantial, Diligent, And Good Faith Efforts To Pay The Judgment.

A party may be held in civil contempt for failure to comply with an order of the Court if (1) the order being enforced is clear and unambiguous, (2) the proof of the noncompliance is clear and convincing, and (3) the defendants have not been reasonably diligent and energetic in

attempting to accomplish what was ordered. *Perez v. Danbury Hosp.*, 347 F. 3d 419, 423-34 (2d Cir. 2003); *SEC v. Bremont*, 2003 U.S. Dist. LEXIS 10279 *15 (S.D.N.Y. 2003), citing *EEOC v. Local 638 . . . Local 28 of Sheet Metal Workers Int'l Ass'n*, 753 F.2d 1172, 1178 (2d Cir. 1985), aff'd, 478 U.S. 421 (1986). This Court found that the SEC had established a prima facie showing that Altomare was in contempt. See Opinion and Order entered August 31, 2007 at pp. 18-19 [Docket 202]. Altomare was ordered initially to appear and show cause why he should not be held in contempt on October 12, 2007. The Court held subsequent hearings on January 18, and February 4, 2008.

The reasonable efforts requirement is strictly construed. *Id.* "Even if the efforts he did make were 'substantial,' 'diligent,' or 'in good faith,' . . . the fact that [respondent] did not make all reasonable efforts establishes that [he] did not sufficiently rebut the . . . prima facie showing of contempt." *Id.* at 15-16, citing *United States v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984) (internal citations omitted) (holding that the trial court's use of a "some efforts" standard for measuring the strength of respondent's defense constituted an abuse of discretion). Furthermore, "[a] party seeking to avoid a finding of contempt must demonstrate that all reasonable avenues for raising funds have been explored and exhausted." *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 26 (D.D.C. 2000) (internal quotation marks omitted). To show good faith, the defendant's duty includes the obligation to be "reasonably diligent and energetic in attempting to comply with [this court's] order," and to pay what he can toward the judgment even if that results in diminution of his income or his relatively comfortable standard of living. *SEC v. Showalter*, 227 F. Supp 2d 110, 120 (D.D.C. 2002), citing *SEC v. Musella*, 818 F. Supp. 600, 601-2 (S.D.N.Y. 1993).

Altomare bears the burden of producing evidence of his inability to comply with the Court's order to pay disgorgement and prejudgment interest. *Huber v. Marine Midland Bank,* 51 F.3d 5, 10 (2d Cir. 1995). To meet this burden, the defendant must prove "plainly and unmistakably that the compliance is impossible." *United States v. Rylander*, 460 U.S. 752, 757 (1983); *In re Byrd Coal Co.*, 83 F.2d 256 (2d Cir. 1936) (contemnor must swear "categorically and in detail" to his present resources and show what became of the money he took). Inability to comply is only a complete defense if the defendant cannot pay any of the judgment; otherwise, he must pay what he can. *SEC v. Bilzerian*, 112 F. Supp. 2d at 17, 27. To the extent that a defendant's inability to comply is self-created, it is not a defense to a finding of contempt. *Id*. at 17 and 28. "It is well-settled that if a court finds that a defendant could at some time in the past have complied with a court order, the court should presume a present ability to comply." *SEC v. Princeton Economic International Ltd*., 152 F. Supp. 2d 456, 459 (S.D.N.Y. 2001). A defendant must "in good faith employ[ ] the utmost diligence in discharging his responsibilities" to satisfy the disgorgement order. *Musella*, 818 F. Supp. at 602. Altomare has failed to meet his burden.

II. Altomare Has Failed to Demonstrate His Inability to Pay the Judgment.

A. Altomare Failed to Pay the Judgment while Over $3.8 Million Passed through His Accounts.

As demonstrated by the evidence presented at the hearing, Altomare has made no good faith effort to diligently and energetically pay disgorgement and prejudgment interest since entry of the judgment on March 8, 2007. During the past eighteen months, while more than $3,805,366[2] has passed through his bank accounts or been directed to third parties for his benefit, Altomare has made no effort to pay the judgment; rather he has used the funds to purchase a second multi-million dollar home and various luxury items. Only after the first contempt hearing

[2] See footnote 2 above for calculation of this amount.

on October 12, 2007, did he submit four payments totaling $60,000 into the registry of the court.[3] Altomare has failed to meet his burden of proof that payment of the judgment is impossible.

1. Altomare Failed to Use Compensation From Universal Express to Pay the Judgment.

During 2006, Altomare received $1,670,000 in compensation from Universal Express, Inc. ("Universal Express"). See 2006 Form W-2, PEx 13; Tr. at 87:13-88:23.[4] Altomare received a salary of $650,000 paid by Universal Express between July 1, 2005 and June 30, 2006, and $1,020,000 in additional compensation after July 1, 2006. See annual report of Universal Express on Form 10-K, PEx 3 at pp. 48-50; Tr. at 82:16-19, 83:10-20. However, he produced no bank account statements, deposit items, cancelled checks, or a sworn accounting of the receipt and disbursement of over one million dollars in compensation received in the six months prior to entry of the judgment. Altomare represented in a November 2006 mortgage application that his monthly expenses, including the current mortgage on his home on Bocaire Boulevard in Boca Raton, Florida, totaled $17,722. Countrywide mortgage application, DEx 3 at p. 172. Using Altomare's monthly estimate to calculate his expenses on an annual basis, Altomare's living expenses for 2006 were approximately $212,664, yet he produced no information on how, or if, he spent the remaining $1,457,336 that he had received in compensation from Universal Express during 2006. Nor did he demonstrate why those funds were not available to pay the judgment subsequently entered in March 2007.

On October 1, 2006, Altomare, as the sole director of Universal Express, granted himself a bonus of $550,000 to be drawn upon at his discretion. See Written Consent of Board of

[3] Altomare's fourth payment of $10,000 was made on March 5, 2008. [Docket entry March 12, 2008]

[4] References to the Plaintiff's exhibits admitted at the hearing are noted as "PEx _" and to Defendant Altomare's exhibits as "DEx _." The pages of Altomare's exhibits are numbered RAA020408-0001 through 0547, references to the page numbers of the exhibits will be to the last three digits of the page number. New exhibits submitted with this memorandum are identified as Exhibits A-K. References to Altomare's testimony in the transcript of the February 4, 2008 hearing are noted as "Tr. at p. _." A copy of the transcript is attached as Exhibit L.

Directors of Universal Express, PEx 56 at p. 2. On January 12, 2007, Altomare directed Universal Express to issue a bonus check to himself for $200,000. Bonus check, PEx 15. Altomare used none of the funds from this bonus check to pay the March 8, 2007 judgment nor did he identify into what account the funds were deposited. Tr. at p. 111:10-14. Altomare provided no evidence at the hearing about the disposition of the $350,000 balance of his bonus nor did he explain why he did not apply these funds to pay the judgment. When asked about this bonus during his deposition, Altomare asserted his Fifth Amendment rights and refused to answer. PEx 58 at p. 21:13-19, 25:3-26:23.

During 2007, Altomare received $1,745,000 in compensation from Universal Express. See 2007 Form W-2, DEx 22; Tr. at p. 82:10-15. Altomare failed to provide documentation establishing his disposition of these funds or why these funds were not used to satisfy the judgment. Altomare's production of his 2007 Wachovia bank statements, DEx 1, without any deposit items or cancelled checks to show the sources of funds received or recipients of funds disbursed, does not meet his burden of production. *SEC v. Margolin*, 1996 U.S. Dist. LEXIS 11299 **7-10 (S.D.N.Y. 1996) (conclusory statements inadequate to meet burden of production and written submissions which do not include cancelled checks are insufficient); *SEC v. Showalter*, 227 F. Supp. 2d 110, 122-23 (D.D.C. 2002) (self-serving, unsubstantiated testimony without appropriate documentation is insufficient to demonstrate inability to pay). It is Altomare's obligation to obtain the bank records and other information to track the receipt and disbursement of his funds to show categorically and in detail that he is unable to comply with the disgorgement order. *SEC v. Bankers Alliance Corp*., 1995 U.S. Dist. LEXIS 14730 *31-32. (D.D.C. 1995).

Between January 9, 2007 and January 8, 2008, Altomare deposited a total of $1,572,845 into the Wachovia bank account; of the total amount, $1,185,117 was deposited on or after March 8, 2007. Summary of Wachovia bank account, PEx 19; and Exhibit K, Matticks Declaration at ¶¶ 2-5. Altomare used none of these funds to pay the judgment. The Wachovia bank account statements do not identify the sources of these deposits. See Wachovia bank statements, DEx 1. Altomare testified that his only source of money over the past seventeen years was from Universal Express. Tr. at pp. 17:22-18:10. However, that testimony about Universal Express being his sole source of income without corroboration of deposit items or cancelled checks is not credible. The Court need not accept conclusory statements from Altomare that are not supported by third-party business records. *SEC v. Kenton Capital Ltd.*, 983 F. Supp. 13, 15 (D.D.C. 1997). There were deposits totaling $747,175.46 into the Wachovia bank account during 2007 which did not come from Universal Express. Exhibit K, Matticks Declaration at ¶ 9. After being confronted with the fact that funds were distributed to him from the Washington Mutual second mortgage, Altomare added that it was possible some money from one of the credit facilities, or second mortgages, was deposited into his account at Wachovia. Tr. at p. 113:14-22.

Based on a comparison of dates and amounts, the SEC can infer that payments from Universal Express comprise $825,669.73 of the total deposits into the Wachovia bank account, which leaves the sources of the remaining $747,175.46 in deposits during this period unidentified.[5] Summary of Altomare account, PEx 19; Exhibit K, Matticks Declaration at ¶ 9.

[5] Between March 23, and July 2, 2007, Altomare directed Universal Express to wire transfer a total of $335,000 to his Wachovia bank account. These transfers were in addition to any salary he received and are included in the deposits attributed above to Universal Express. PEx 16 and DEx 1. Altomare did not use any of these funds to pay the judgment.

Altomare did not identify the sources of these deposits.[6] In particular, Altomare failed to identify the sources of $6,000 and $18,500 deposited on June 29, and July 9, 2007. PEx 18 at p. 61; Tr. at pp. 112:20-113:22. He could not identify the sources of $20,000, $35,000 or $35,000 deposited on July 13, 18, and 24, 2007 respectively, other than to parrot that all the money that ever came into his account was from Universal Express. Wachovia bank statements, PEx 18 at 68; Tr. at p. 114:8-24. The Universal Express bank records do not corroborate his statement. While Universal Express issued four paychecks to Altomare and his wife on July 13 and 27, 2007 in the amounts of $16,718.59, $2,004.54, $16,653.03, and $2,004.54,[7] the amounts of these checks do not correspond to the three deposits in July about which he was asked.[8] Wachovia bank statements, PEx 18 at p. 68.

Altomare did not identify the sources of the additional $46,337.78 deposited into his Wachovia account between August 7, and September 7, 2007, other than to say that the money came from Universal Express. Tr. at pp. 103:11-13, 113:14-114:7, 115:4-18. The Universal Express bank records do not show payments to Altomare of this additional $46,337.78 during the month between August 7, and September 7, 2007. See summary of Universal Express payroll checks to Altomare, PEx 14; summary of Universal Express checking account, PEx 16. The Wachovia bank account statements for September 8, 2007 through January 8, 2008, show

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[6] On January 30, 2008, three days before the hearing on this matter, Altomare produced the Wachovia bank account statements for September 8, 2007 through January 8, 2008, which show monthly deposits of $186,240.01, $46,682.42, $53,425.40 and $25,818.90 that together total $312,166.73. DEX 1 at pp. 52, 58, 65, and 71; Exhibit K, Matticks Declaration at ¶4. The bank statements show a deposit of $150,000 into the Wachovia account on September 26, 2007, which is contemporaneous with Altomare's receipt of cash from the jewelry transactions. However, Altomare did not testify that the proceeds from the jewelry transactions were the source of this $150,000 deposit nor did he identify the sources of any of the other deposits during this four month period. Tr. at pp. 39:21-40:6.

[7] Summary of Altomares' 2007 paychecks, PEx 14 at pp. 1, 9, 10, 18, 19.

[8] It appears that Altomare deposited the two July 27, 2007 paychecks totaling $18,657.57 and the two August 10, 2007 paychecks totaling $18,723.13 as one deposit of $37,380.70 into the Wachovia bank account on August 13, 2007. See summary of paychecks, PEx 14; and August 13, 2007 deposit listed in Altomare's Wachovia bank statements, PEx 18 at pp. 68, 74. While the SEC can infer that these four paychecks are the source of the funds deposited on August 13, 2007, it is Altomare's burden to demonstrate the source of these deposits, and all the other deposits made into his account during 2007, which he has failed to do categorically and in detail.

monthly deposits of $186,240.01, $46,682.42, $53,425.40, and $25,818.90 that together total $312,166.73. DEX 1 at pp. 52, 58, 65, and 71; Exhibit K, Matticks Declaration at ¶ 4. Altomare did not identify the sources of these deposits.

2. Altomare Failed to Use Funds From Credit Lines to Pay the Judgment.

On November 3, 2006, Altomare and his wife purchased a second home,[9] a condominium located at 3720 S. Ocean Boulevard, Apartment 1606/07, Highland Beach, Florida, for $3,100,000 with a first mortgage of $2,030,000 and a second mortgage of $580,000 (referred to herein as the "condo"). Countrywide mortgage documents, DEx 3; Countrywide second mortgage documents, DEx 4; Condo Settlement Sheet, PEx 61. Altomare testified that he had no recollection of the source of the $100,000 he paid in earnest money, nor did he provide any evidence on the source of the $158,210 he paid at the closing.[10] Condo Settlement Sheet, PEx 61; Tr. at pp. 46:5-19, 47:8-22. Altomare directed Universal Express to pay $330,000 to the law firm of Rose & Rose, P.A. on October 26, 2006, which funds Altomare then used to complete the purchase of the condo. Universal Express bank statement, PEx 46 at p. 2; Tr. at pp. 48:1-49:10. Where Altomare had access to unidentified sources of income in late 2006, it is reasonable to infer that he continued to have access to those sources in 2007 at the time of entry of the judgment.

On January 30, 2007, Altomare obtained from Washington Mutual a $750,000 line of credit secured by the condo to replace the second mortgage with Countrywide Bank. See

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[9] Altomare and his wife own and reside at 4904 Bocaire Boulevard, Boca Raton, Florida. Tr. at p. 25:8-24. Altomare valued this home at $1,400,000 on his November 3, 2006 mortgage application. DEx 3 at p. 172. A billing statement indicates the mortgage on the property has a balance owing of $1,033, 514 with monthly payments due of $4,792. DEx 7 at p. 253.

[10] Altomare's testimony is contradicted by his deposition testimony on November 12, 2007 at which he stated the down payment came from his checking account at Wachovia. See Altomare deposition, PEx 58 at p. 9:20-10:21. It appears that Altomare paid the $158,210 in closing costs from a draw against his Wachovia credit line. See Exhibit D at p. 56, 58, and 59.

Washington Mutual Agreement and Disclosure, DEx 8 at pp. 271-79; Tr. at pp. 64:22-65:4. Altomare used $588,158 of the loan proceeds to pay off the second mortgage on the condo and directed the $160,466 in funds remaining after paying various expenses, to be disbursed to him. *Id*., DEx 8 at 270; Tr. at pp. 65:5-66:9. However, he provided no documents showing the receipt of these funds into any of the accounts he has identified. No deposit of $160,466 is reflected in the Wachovia bank account statements produced by Altomare. Wachovia bank statements, DEx 1 at pp. 2, 8. Altomare used none of the funds from this line of credit to pay the March 8, 2007 judgment. The loan application documents show that Altomare opened a checking account with the number ending in 1791 with Washington Mutual and authorized payments to be withdrawn from the account. DEx 8 at pp. 261, 280. However, he provided no account statements or other bank records for this account.

Altomare's Wachovia bank account statements report the monthly balance of a prime equity line of credit for account number ending in 4286 ("Wachovia credit line"), which had an outstanding balance of $35,020 on February 2, 2007. Wachovia bank statements, DEx 1 at p. 1. Despite withdrawing $164,900 in funds from the credit line on or after March 8, 2007, Altomare used none of these funds to pay the judgment. Instead Altomare made various draws during 2007 totaling $288,900 against the credit line, which increased the amount he owed to $187,440 as of January 7, 2008.[11] *Id*., DEx 1 at p. 70. He used none of the funds drawn on this line of credit to pay the judgment. Altomare produced no records for this credit line to identify to whom disbursements from the line of credit were paid or the source of payments received to reduce the

[11] Altomare's withdrawals were offset by payments of $70,000 from Universal Express and payments of $185,000 from Altomare's Wachovia bank account. Records from Universal Express show that on December 29, 2006, and February 27, 2007, Altomare directed Universal Express to pay $20,000 and $50,000 respectively to the Wachovia credit line. PEx 11 at p. 6. Altomare transferred $132,000 from his Wachovia bank account on January 16, 2007, which reduced the balance of the credit line to $35,020.95 reported on February 5, 200; he transferred an additional $40,000 to the credit line on March 30, 2007, and $5,000 on July 25, 2007. DEx 1 at pp. 1, 4, 14, & 43. Altomare provided no documents to show who received the benefit of the funds withdrawn from the credit line.

account balance. The Receiver obtained bank statements for this account, which show the balance on October 14, 2006 was $10,481.38. Exhibit D, at p. 54; Exhibit K, Matticks Declaration ¶10. Since January 1, 2007, Altomare has withdrawn $288,900 from the Wachovia credit line. Exhibit E; Exhibit K, Matticks Declaration ¶10. The Altomares directed a $10,000 payment to Steinway Piano Gallery on June 18, 2007. The other withdrawals were paid into the Wachovia bank account. Altomare produced no information about to whom he paid the funds from these cash withdrawals nor did he use these funds to pay the judgment.

Altomare also received cash advances of at least $35,000 and $10,000 on July 24, and August 8, 2007, respectively, from his World Points credit card with Bank of America. See Tifford letter with particular credit card statements, DEx 24 at p. 540. However, Altomare provided no testimony on his disposition of those funds. The Receiver stated that Universal Express paid all of Altomare's credit card expenses and the company did not receive the cash advances. See paragraph 4 of Affidavit of Jane W. Moscowitz attached as Exhibit F.

3. Altomare Failed to Use Proceeds From Jewelry Sales to Pay the Judgment.

Between April 13, 2006 and May 16, 2007, Altomare directed Universal Express to transfer directly to Les Bijoux LLC, a jewelry store in Boca Raton, Florida, at least $613,900 to pay for jewelry purchases. See Universal Express bank records showing transfers, and Receiver's Summaries of Funds Paid to Altomare in 2006 and 2007, PEx 60, 65, and 66. Altomare also paid an additional $20,000 to Les Bijoux on his Bank of America credit card in July 2006, which expense Universal Express paid. See Exhibit F, Affidavit of Jane Moscowitz and attachment B at p. 4. On September 24, and 25, 2007, Altomare sold twenty-four items of jewelry, including several watches and two silver bars, to The Estate Department, a second hand dealer located in Florida, for cash proceeds totaling $571,000. Second Hand Dealer's Property

Forms, PEx 38A, 38B and 38C. Although Altomare received $501,000 in cash from his conveyance of jewelry on September 24 and 25, 2007, and an additional $70,000 on October 5, 2007, a mere seven days before the Court's initial hearing on his contempt, Altomare refused to pay these funds into the registry of the court as partial satisfaction of the judgment and failed to produce business records demonstrating the disposition of these funds.

Altomare produced Commerce Bank account statements for his wife's account showing the deposit of $200,000 into the account on October 4, 2007. DEx 19 at p. 501. Altomare testified that he had paid $150,000 of the funds deposited into this account as a retainer to his attorney in this case. But he did not provide a copy of the retainer agreement with his attorney, any documents showing the rate at which the attorney agreed to be paid, or contemporaneous billing records showing the expenditure of any of funds deposited into the trust account of his attorney. Tr. at pp. 77:1-80:16. Moreover Altomare's unsupported testimony that all the money transferred to his attorney has been expended as legal fees is not credible in light of the following facts. Prior to appointment of the Receiver in this case, Altomare's counsel represented defendants Universal Express, Altomare, and Chris Gunderson in this case and the related appeal. During 2006, while the parties were engaged in substantial discovery and preparation of motions for summary judgment, Altomare's counsel was paid $40,194.48 for all his legal work provided between July 1, 2005 and June 30, 2006. See the Accounting Ledger of Legal Fees, PEx 51, the total for the fifth column titled "Tifford." Altomare's payment of $150,000 as a purported retainer to his attorney is more than three times the attorney's compensation in the prior year. Accordingly, Altomare has failed to meet his burden of proof that the $150,000 paid to his attorney as a retainer is not currently available for payment on the judgment.

Altomare also testified that he paid $50,000 of the funds from the jewelry sale to DLA

Piper, another law firm, but he provided no proof of payment. Tr. at pp. 40:1-6, 122:2-14. While the Wachovia bank account statement shows payment of check 4261 for $50,000 on October 1, 2007, Altomare provided no records to indicate to whom the money was paid, whether to DLA Piper, another third-party, or himself. Wachovia bank statements, DEx 1 at p. 53. Nor did he provide any invoices or an affidavit from the law firm affirming receipt of the funds.

Furthermore, Altomare has not accounted for the disposition of the additional $371,000 in cash he received from the jewelry transactions. Altomare testified that the "$300,000" went into his Wachovia account and was used to pay everyday expenses; however, he did not identify any particular deposit or deposits related to those funds. Tr. at pp. 39:25-40:6, 40:24-41:2, 75:10-14. Between September 26, 2007 and January 8, 2008, the Wachovia bank account statements list a number of deposits subsequent to the two jewelry transactions on September 24, and 25, 2007, which deposits total $270,006.50[12] and include one deposit in the amount of $150,000 on September 26, 2007. However, Altomare provided no documents to identify the sources of these deposits. Wachovia bank statements, DEx 1 at pp. 52, 58, 65, 71. Assuming for the sake of argument that all of the $270,006.50 in deposits following September 26, 2007 were the funds from the jewelry transactions, Altomare has failed to account for his disposition of the additional $100,993.50 he received from the jewelry transactions. If in fact only the $150,000 deposit is from the proceeds of the jewelry transactions, and the remaining deposits are funds from other sources, then Altomare has failed to account for $221,000 in proceeds from the jewelry transactions. In either situation, Altomare has failed to meet his burden of demonstrating

[12] Between September 8, 2007 and January 8, 2008, the Wachovia bank statements identify four monthly deposits of $305.53 from the New York State Teachers Retirement program ($1,222.12), four interest payments totaling $8.11, and a transfer into the account of $5,000 from the Wachovia line of credit that together total $6,230.23. This sum is not included in the amount of the unidentified deposits.

the source of the various deposits and the disposition of the proceeds from the jewelry transactions.

B. Altomare Failed to Produce Detailed Evidence of His Expenditures During 2007.

During 2007, the Altomares issued approximately 680 checks drawn on the Wachovia bank account, which payments along with electronic funds transactions totaled $1,605,216.01. All but $425,311 of these withdrawals was expended after entry of the judgment on March 8, 2007.[13] At least sixty-two of these checks are for amounts over $4,000, with the highest check issued in the amount of $90,000; together the sixty-two checks total $979,428.01. See summary of checks, Exhibit G attached to this pleading. Altomare provided no evidence identifying to whom these checks were paid or establishing that he did not receive the proceeds from these checks. Altomare's conclusory statement that he used the funds in his Wachovia bank account to pay everyday living expenses does not meet his burden of production. Tr. at pp. 35:20-36:3, 39:25-40:6. More significantly, he has no basis of knowledge for his statement. On November 12, 2007, he testified that his wife handled all the checks and he had never written a check. PEx 58 at p. 10:10-21. He must provide a witness with knowledge of the disposition of funds from the checking account and documentation to corroborate his statements. See *Kenton Capital Ltd.*, 983 F. Supp. 13 at 15; *Margolin*, 1996 U.S. Dist. LEXIS 11299 *9-10.

Altomare's expenditure of over $1,605,216.01 from his Wachovia bank account during 2007 is inconsistent with representations he made about his living expenses in his November 3, 2006 loan application. DEx 3 at p. 171-174. In the application, Altomare represented that his

[13] This estimate of 680 checks is based on the check numbers listed on the account statements, which range from number 3738 to 4420, although the statements indicate there are breaks in the check number sequence. DEx 1 at pp. 3, 73. Between January 9, 2007 and January 8, 2008, the withdrawals totaled $1,605,216.01. PEx 19 and Exhibit K, Matticks Declaration at ¶ 4 & 5.

current monthly income was $58,333, his monthly housing expenses were $5,791 and his monthly liabilities for credit card debt and car loans were $11,931. *Id*. at p. 172. He represented that his monthly housing expenses would increase by $13,775.23 after closing on the condo. *Id*. Based on these representations, Altomare's monthly expenses in 2007 should have been approximately $31,497, making his annual expenses roughly $377,967. Although Altomare received $1,745,000 in compensation from Universal Express during 2007,[14] he has not adequately explained why his expenditures exceeded his living expenses by approximately $1.3 million.

At the hearing on February 4, 2008, Altomare produced letter agreements, invoices and Schedules of Payments from the Weinstein Design Group, which the Altomares retained to remodel the condo. DEx 9. The March 21, 2007 invoice from the Weinstein Design Group indicates that as of that date, the Altomares had paid $306,535.51 toward the remodel and furnishing of the condo. DEx 9 at p. 335. The November 26, 2007 invoice indicates the Altomares have paid $673,425.35 to the Weinstein Design Group subsequent to entry of the judgment. DEx 9 at p. 395. Altomare produced no documents or explanation of the sources of money used to pay the Weinstein Design Group invoices.

C. Altomare Has Not Demonstrated that All Reasonable Avenues For Raising Funds Have Been Explored And Exhausted.

Altomare identified his assets as his residence at Bocaire Boulevard, Boca Raton, Florida, which he valued at $1,400,000 on November 3, 2006, DEx 3 at p. 172; and his second home, the condo located in Highland Beach, Florida, which he purchased for $3,100,000 on November 3, 2006, PEx 61. Tr. at pp. 25:8-22, 26:18-27:2. The Court may consider an alleged contemnor's homestead as well as jointly owned assets in determining his ability to comply with its

[14] See 2007 Form W-2, DEx 22.

disgorgement order. *SEC v. Bilzerian*, 112 F. Supp. 2d at 27 n. 29. On January 16, 2008, the current balance owed on the mortgage on the Bocaire house was $1,033,514. American Home Mortgage statement, DEx 7. Altomare estimates the current value of this Bocaire house is $1.1 million, but he provided no evidence in the form of a real estate appraisal to support his statement. Based on the represented value in the loan application and the current amount owed on the mortgage, the Altomares have approximately $265,000 in equity in the Bocaire house. Altomare produced no evidence to support his statement that there is a second mortgage encumbering the Bocaire house. Tr. at p. 26:2-11.

On November 29, 2007, the current balance owed on the first mortgage on the condo was $2,099,222. DEx 5 at p. 250. The current balance on the second mortgage on the condo was $747,801. DEx 6 at p. 252. Altomare estimated the value of the condo is between $2.5 million and $2.8 million. Tr. at pp. 26:24-28:10. However, Altomare provided no affidavits, depositions, or testimony from witnesses about his efforts, if any, to sell these two properties in order to acquire funds to pay the judgment.

Altomare identified three additional assets to include (1) his stock in Universal Express, (2) an interest in two judgments being collected by Mr. Tifford, and (3) a percentage ownership in the Jackson Family Memorabilia collection, which is in litigation. Tr. at pp. 28:11-29:8. Altomare owns at least 16,211,427 class A common shares of Universal Express as of March 31, 2007 as represented in the company's transfer agent records. Transfer agent shareholder list, PEx 17. Altomare also represented in Universal Express' annual report on Form 10-K for the year ending June 30, 2006 that he owned 1,280,000 class B shares which could be converted into 22,990,173 class A shares which would comprise .0018% of the outstanding shares. Tr. at pp. 53:13-54:18; PEx 3 at p. 33. Although Altomare reported that he beneficially owned 22,990,173

shares of Universal Express stock as of June 30, 2006, he has made no attempt to sell these shares and pay the proceeds to satisfy the judgment.

Aside from identifying his interest in two judgments, Altomare provided no documents on the identity of the parties against whom the judgments were entered, the current value of the judgments, the status of the collections, or amounts he has received to date as a result of his interest in the judgments. Altomare also claims an interest in the Jackson Family Memorabilia collection, but he submitted no documents showing the basis for his interest, what if any consideration he paid for his interest, an inventory of the collection, any appraisals he has received establishing the value of the collection, or any documentation showing the limits on his ability to sell the collection. He refused at his deposition to answer questions regarding the collection. PEx 58 at pp. 34:11-39:11. Altomare refused to turn over to the Receiver several boxes of master tapes, until the Receiver obtained the Court's order to compel his release of the tapes, which he retained until March 13, 2008.

Altomare directed Universal Express to pay $77,000 to his two sons in 2006 and another $58,904 in 2007, of which $57,200 was transferred on or after the date of the judgment on March 8, 2007. Altomare contends the payments were part of his own salary from Universal Express. PEx 4 and PEx 23; Tr. at pp. 103:14-104:11. Altomare could have directed Universal Express to make these payments in 2007 toward satisfaction of the judgment, but he did not. Altomare has made no effort to recover these funds from his adult children to pay the judgment.

Altomare has continued to pay $4,600 a month for life insurance premiums since entry of the judgment although he has no minor children. See examples of monthly payments in other withdrawals listed on 1/25/07 and 9/25/07 in Wachovia bank statements, DEx 1 at pp. 4, 55. In the twelve months that have passed since entry of the judgment, these premiums have

accumulated to $55,200 that Altomare could have paid toward the judgment.

Altomare leases three luxury cars, a 2006 Bentley, a 2007 Mercedes Benz ML350, and a 2007 Mercedes Benz S550V, for monthly payments totaling $6,008.52; and pays monthly insurance premiums of $495 and $1,857. See car lease documents, DEx 13, 14, 15, and examples of insurance payments in Wachovia bank statements, DEx 1 at pp. 54, 55 (9/21 payment to GEICO and 9/28 payment to GLAIC). Although Altomare represents he has had no sources of income since the appointment of the Receiver on August 31, 2007, he has made no arrangements to terminate any of these leases and reduce his insurance costs. Post-judgment payments to lease these three luxury cars and pay monthly insurance premiums for the intervening twelve months total $100,326.

Following entry of the judgment on March 8, 2007, Altomare contracted for at least $99,266.15 in additional expenses to remodel and furnish the condo rather than paying these funds toward satisfaction of the judgment.[15] The Altomares also installed approximately $98,970 of audio and video equipment in the condo based on a proposal dated February 7, 2007.[16] The invoice for the audio and video equipment indicates payments of at least $43,970.90 were made after entry of the judgment. DEx 10 at p. 425. Altomare has made no effort to sell the furnishings or audio/video equipment to pay the judgment. Tr. at 70:25-72:17.

Altomare did not identify other assets which he could liquidate to satisfy the judgment. These assets include a collection of artwork that he valued at $3,000,000, and jewelry that he valued at $3,000,000 in March 2007. See Altomare March 2007 financial statement, Exhibit H, produced subsequent to the hearing in this matter at the deposition of Joseph Garrahan on March 11, 2008. Altomare did not identify the piece or pieces of art purchased from the Caesarea

[15] See difference in Taxed Grand Total Amount of $591,225.99 on 3/21/2007 statement, and increased amount of $690,492.14 on 11/26/2007 statement. Weinstein Group invoices, DEx 9 at pp. 335 & 395.

[16] Harmony Home System Invoice, DEx 10; Tr. at 70:25-72:17.

Gallery during 2001 and 2002 for $19,000. Tr. at pp. 115:24-116:9; Checks to Caesarea Gallery, PEx 21. He did not identify the sale of a French poster for approximately $7,000. Tr. at p. 70:18-24. He did not identify the Steinway piano purchased through the Wachovia line of credit on June 18, 2007 for $10,000. He did not identify the antique chandelier purchased for $33,000 in 2002. Chandelier invoice, PEx 22; Tr. at p. 116:-10-16. Altomare testified that he had no cash surrender value for his life insurance, Tr. at p. 119:22-24; yet he represented he had $7,000,000 in cash value of life insurance in his financial statement on March 2007. Altomare March 2007 financial statement, Exhibit H. In light of Altomare's inconsistent statements and omissions regarding his assets, he has failed to meet his burden of production to establish payment of the judgment is impossible.

III. Altomare's Testimony is Not Credible.

During 2007, Altomare received $1,745,000 in compensation from Universal Express. 2007 Form W-2, DEx 22; Tr. at p. 82:10-15. Yet Altomare failed to provide credible testimony, a sworn accounting or third-party documents showing his receipt and disposition of these funds in a detailed and categorical manner that would meet his burden of production to establish his inability to pay the judgment. Tr. at pp. 113:23-114:7. On August 9, 2007, the SEC requested documents that identified: "(1) (a) all receipts of income from any source of $500 or more by you, your spouse, or any member of your household, and (b) the date, source, recipient, and amount of each receipt; (2) receipt of funds from Universal Express, including deposit slips; and (3) (a) all expenditures or gifts of $500 or more and (b) the purpose, amount and payee of each such expense." Request for Production of Documents, PEx 44, items 1, 2 & 3. Altomare provided no such detail in his response to the requests for production, stating he had "none" other than what may be business records in the possession of the Receiver. See, Altomare

Response to Request for Production, PEx 45, answers to items 1, 2 & 3. His response that the materials are in the hands of the Receiver is inadequate to meet his burden of production where he can obtain the records from his own banking institution. See e.g. *SEC v. Bankers Alliance Corp*., 1995 U.S. Dist. LEXIS 14730 *29-32 (D.D.C. 1995) (defendant's burden to obtain bank records of funds disbursed).

Moreover, Altomare's answers to the requests are not truthful as his bank statements demonstrate numerous deposits and payments over the amount of $500. See Wachovia bank statements, DEx 1, and Exhibit G listing checks over $4,000. The credit card statements he produced at the hearing likewise contain numerous expenditures over $500 which he has not explained.[17] Although knowing of the SEC's request since August 9, Altomare made no attempt to acquire these records from his banks or provide evidence why he cannot obtain copies of the bank records including deposit slips, deposit items, and cancelled checks. Tr. at pp. 114:25-115:3.

On January 25, 2008, when the SEC reiterated its earlier request for the detailed materials necessary to identify the source of each deposit over $500 and particularly the source of the $200,000 deposit on January 12, 2007, Exhibit I, Altomare simply referred to copies of his bank statements, DEx 1. These bank statements do not identify the sources of any deposits. More significantly, Altomare represented, through the letter of his attorney, that the $200,000 deposit on January 12, 2007 was "the net proceeds of the second mortgage on the Highland Beach Condominium originating from the second mortgagee, Washington Mutual Bank." Exhibit J. Contrary to Altomare's representation, the second mortgage from Washington Mutual was not

[17] See for example World Point statements for June and May 2007, DEx 24 at p. 536-537, showing 5/20/07 payment of $2,572.78 to Wynn Las Vegas, 5/19/07 payment to Jo Malone of $1,020, 5/19/07 payment of $700.38 to Chanel #23, 6/10/07 payment $5,945.40 to Ritz Carlton, 6/8/07 payment of $729.60 to Thalassa, 4/17/07 payment of $1,010.19 to Reunion Resort, 4/23/07 payment of $1,880.82 to Bova Restorante, 5/6/07 payment of $2,820.65 to Ritz Carlton, 5/8/07 payment of $6,500 to Core Club.

completed until after January 30, 2007, more than two weeks after the date of the $200,000 deposit. The additional funds transferred to Altomare from the line of credit were $160,466, and so based on the date and amount the Washington Mutual credit line could not be the source of this deposit. Washington Mutual loan application, DEx 8 at pp. 270-279.

Altomare testified that between 1994 and 2003 he was not paid a salary, and instead he accrued salary at the rate of between $100,000 and $300,000 per year with his compensation in most of the years being at $100,000. Tr. at pp. 13:5-9; 15:1-8. Altomare's testimony is contradicted by a Written Consent that he signed on June 15, 1998 increasing his annual compensation to $300,000. Exhibit A. Altomare subsequently increased his compensation to $500,000 effective July 1, 2003. Exhibit B. Contrary to his testimony, Altomare reported in Universal Express' annual report for 2003, that he had received an annual salary of $300,000 in each year from 1999 through 2003, that he received cash compensation of $235,844 during the fiscal year ending June 30, 2003 and that his accrued salary totaled $1,076,556. See 2003 annual report of Universal Express, Exhibit C at p. 17. He reported his loan balance as of June 30, 2003 was $819,060, and his wife's loan balance was $906,000. *Id.* at p. 19, 21.

Altomare represented in his November 3, 2006 loan application that the current balance in his checking account was $1,168,443, that he owned stocks and bonds worth $32,000,000, and that he owned real estate worth $1,400,000. *Id*. Altomare admitted that his checking account at Wachovia never contained a million dollars. Tr. at pp. 49:7-51:8. Altomare testified that his representation of owning $32,000,000 in stock was based on his perceived value of Universal Express rather than the value of the shares he actually owned. Tr. at pp. 51:9-52:12. Altomare represented in Universal Express' annual report on Form 10-K for the year ending June 30, 2006 that he owned 1,280,000 class B shares which could be converted into 22,990,173 class A shares

which comprised .0018% of the outstanding shares. Tr. at pp. 53:13-54:18; PEx 3 at p. 33. He agreed that the $32 million value listed in his financial statement was not based on the number of shares he owned or the price at which the shares were trading in November 2006. Tr. at p 55:16-22.

Altomare contends that he was not able to pay the judgment because he was fulfilling contractual obligations related to the build-out and furnishing of the condo into which he and his wife planned to move. Tr. at pp. 29:9-30:9, 35:20-36:6; DEx 9, 10, 11. He asserts that the "contracted sums were already in motion prior to anything that materialized in the court . . . his general counsel . . . advised [him] to continue and to make sure [he] completed this apartment so [he] could sell it and give the proceeds to the court if we lost the appeal." Tr. at p. 68:7-14. However, the documents he submitted do not support his statement. The first document in the compendium of construction agreements and invoices is a November 16, 2006 design fee agreement which obligated the Altomares to pay $20,000 to the Weinstein Design Group, Inc. to design a floor plan with proposed furnishing layouts, which fee was paid by a credit from their Bocaire project. DEx 9 at pp. 308-312. There were no continuing payment terms under this contract; rather the Altomares were to pay fifty percent of any merchandise ordered through the design firm upon placement of the order and to pay the balance upon receipt of an invoice. *Id*. at 309.

The Weinstein Design Group contract further provided that when the Altomares authorized an order they would be billed for 8.75% of the total project costs as a fee for shipping and handling. *Id*. at 308. The two earliest invoices Altomare produced are dated February 19, 2007, but both are marked as being revised on March 21, 2007. DEx 9 at 318-19. The Altomares were charged the 8.75% shipping and handling fee on the entire contract amount of

$525,193.88 (excluding $32,567.90 in pre tax expenses and $343,464.21 in taxes for a grand total of $591,225.99) on March 21, 2007, two weeks after entry of the judgment. It is reasonable to infer from this information, the lack of a written contract for expenses of more than $500,000, and Altomare's failure to provide any earlier contracts or testimony from his contractors that he had not authorized and was not obligated to pay Weinstein Design Group the contract amount of $591,225.99 prior to March 21, 2007, which obligation he incurred after entry of the judgment.

On March 21, 2007, the Altomares received an invoice from the Weinstein Design Group for $22,106.64 to increase the "Schedule of Payments/Open Balances." The March 21, 2007 Schedule of Payments totaled $591,464.21 with tax and indicated the Altomares had already paid $306,535.51 of that amount leaving a balance of $284,690.84. See Invoice at DEx 9 at p. 313, and Schedule of Payments at DEX 9 at p. 335. Had the Altomares adhered to this original Schedule of Payments, they could have paid the $284,690.84 to the Weinstein Design Group through the series of ten wire transfers made between March 27, and July 10, 2007 totaling $335,000 that Altomare directed Universal Express to pay himself, after entry of the judgment; or a combination of his $200,000 bonus and draws against the Wachovia line of credit. He would have still retained over $1.2 million in 2007 compensation from Universal Express with which to pay his judgment. See details of wire transfers in footnote 5 above.

Instead, Altomare flouted the judgment by using his available funds to purchase additional luxury goods to install in the condo. The March 21, 2007 invoice seeks the Altomares approval of new charges for "3760 Additional Lighting [of] $16,976.96" and "3761 Additional Guest Bedroom [of] $8,521.34," DEx 9 at p. 313. These additions were approved and later appear on the June 14, 2007 Schedule of Payments with other additional charges which together

totaled $81,812.69, increasing the grand total on the project to $682,800.07.[18] Weinstein Schedule of Payments, DEx 9 at 343-47. The Altomares approved additional purchases on March 27, April 12, June 26, June 27, and September 25, 2007. DEx 9 at 323.1, 324, 315, 325, 326. By November 26, 2007, the Altomares had approved additional invoices that increased the grand total to $690,492 or over $99,000 above the grand total in the March 21, 2007 Statement of Payments. DEx 9 at 395. The funds Altomare approved and expended on the condo on March 21, 2007, after entry of the judgment, include very expensive furnishings such as a $1,915.42 chaise and $37,674.52 in lighting fixtures, see invoices 3692 & 3689, DEx 9 at pp. 318, 319, 331, 332; additional lighting for the foyer of $16,976.96, furniture for the guest bedroom of $8,521.34, area rugs for $24,364.10, ceiling fans and other items for $7,966.96, a chandelier for $9,269.70, fabrics for the master bedroom of $5,768.60, patio and other furniture of $6,530.66, and marble counter tops for the master bath of $4,535.59. *Id*. at pp. 313, 322, 323, 323.1, 324, 343, & 344. Altomare also had several flat-screen televisions and a sound system installed which cost $98,970, at least 65 percent of which was paid after February 8, 2007 and subsequent to entry of the judgment. The Harmony Home Systems invoice shows $35,000 had been paid as of February 7, 2007, but a balance of $63,970.80 remained with $59,485.40 due on September 4, 2007. DEx 10 at p. 424. Altomare has not attempted to sell any of the flat-screen televisions to raise money to pay the judgment. Tr. at p. 69:3-7; 70:25-72:17.

Altomare testified that he only ever had one bank account which was at Wachovia. Tr. 103:6-13. This statement is contradicted by Altomare's loan application which included his agreement to open a checking account with Washington Mutual, account number ending in 1791,

[18] The June 14, 2007 Schedule of Payments includes eight additional invoices that were not listed on the March 21, 2007 Schedule of Payments. These invoices are: no. 3760 for $16,016; no. 3761 for $8,039; no. 3763 for $22,985; no. 3768 for $8,458; no. 3779 for $8,745; no. 3812 for $6,202.10; no. 3813 for $6,832; and no. 3834 for $4,535.59.

and his directions to the bank to make automatic loan payments from that account. Washington Mutual loan application, DEx 8 at pp. 261 and 280. When asked into what account the $160,466 in additional proceeds from the Washington Mutual second mortgage were paid, Altomare answered either the Wachovia bank account or the Wachovia credit line. Tr. at pp. 65:5-66:7. The Wachovia accounts reflect no such deposit. The existence of this Washington Mutual checking account might explain where the $160,466 in additional proceeds was deposited; however, Altomare has produced no records for this account or which show the disposition of the $160,466. DEx 8 at p. 270. The existence of an additional undisclosed bank account demonstrates Altomare's testimony is to be given little, if no, credibility and that he has not met his burden of production where he has produced no bank statements or other records related to this checking account at Washington Mutual.

IV. The Court Should Draw an Adverse Inference Against Altomare.

Adverse inferences may appropriately be drawn against Altomare based on (a) his assertion, during a deposition conducted by the Receiver on November 12, 2007, of his Fifth Amendment privilege to refuse to testify about details of his finances, see e.g., Altomare deposition, PEx 51 at pp. 7:20-9:14, 15:18-16:6, 17:22-22:9, 25:3-26:23, 27:14-28:17, 34:11-39:11, 50:8-53:9, (b) his failure to provide detailed banking records for his two Wachovia bank accounts and the Washington Mutual account; and (c) failure to call any witnesses other than himself. *SEC v. Bremont*, 2003 U.S. Dist. LEXIS 10279 *13-14 (S.D.N.Y. 2003).

Having chosen not to seek a stay of the judgment of this Court during the pendency of his appeal to the Second Circuit, Altomare has refused to pay any portion of the judgment prior to entry of the order of contempt on August 31, 2007, because of his personal animus toward the government of the United States. See Altomare's statements in the February 23 and September

4, 2007 press releases challenging the court's decision. Press releases on court decisions, PEx 9 and 6.

V. Conclusion – Incarceration of Altomare is the Only Viable Sanction.

The judgment unambiguously required Altomare to disgorge $1,419,025 in ill-gotten gains and pay $283,073 in prejudgment interest within ten days of entry of the judgment on March 8, 2007. Altomare did not make the payments as ordered. He has made four payments totaling $60,000 subsequent to the Court's contempt hearing on October 12, 2007. Rather than acting diligently to disgorge his illicit profits, Altomare repeatedly flouted the judgment by using his available funds to purchase luxury goods. As discussed above, while disgorging only minimal funds, Altomare (1) has spent at least $690,492 to remodel and furnish a second home; (2) received at least $1,740,000 in compensation from Universal Express during 2007 for which he has not accounted; (3) gave his sons $134,200 during 2006 and 2007 which he has not attempted to recover; (4) obtained at least $160,466 from his credit line at Washington Mutual and $288,900 from his credit line at Wachovia which he did not use to pay the judgment; (5) sold at least $570,000 in jewelry for which he has not accounted; (6) provided incomplete bank records and no sworn accounting; (7) failed to identify all of his assets; and (8) lied to the Court. Altomare's failure to provide credible evidence of the sources of over $1.5 million in deposits into the Wachovia bank account during 2007 and no information on over $1.6 million in distributions does not meet his burden of demonstrating an inability to disgorge his illicit profits in spite of repeated opportunities to do so.

Incarceration under a civil contempt order pending compliance with the Court's order is within the Court's authority and is a well-recognized method of coercing compliance with court orders. *SEC v. Bremont*, 2003 U.S. Dist. LEXIS 10279 at *20-21, citing *Shillanti v. United*

States, 384 U.S. 364, 370-71 (1966) and *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1400 (6th Cir. 1991). In determining an appropriate sanction for civil contempt, a court must consider: (1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and the consequent seriousness of the burden of the sanction. *Bremont* at *21, citing *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 110 (2d Cir. 1987).

Altomare should be incarcerated. His continuing refusal to satisfy the judgment undermines the deterrent effect of the Commission's enforcement actions as well as the enforcement powers of the Court. No other sanction will coerce Altomare to comply. He has already violated the judgment by issuing over 20 billion shares of unregistered Universal Express stock, has paid only $60,000 toward satisfaction of the judgment while more than $3.8 million passed through his bank accounts, has failed to meet his burden of establishing his inability to pay, and has lied to the Court. There is every reason to expect that Altomare will defy further orders of the Court.

Ordering Altomare to pay a daily fine until he complies with the judgment would be futile because he has refused to pay despite the availability of funds and the continued accrual of post-judgment interest. There is no reason to believe that the imposition of fines would be any more likely to coerce his compliance with the judgment. Incarceration is appropriate and reasonable in these circumstances and has been ordered where defendants in securities fraud cases have failed to pay court ordered disgorgement. See *SEC v. Kenton Capital, Ltd.*, 983 F. Supp. at 17-18; *SEC v. Margolin*, 1996 U.S. Dist. LEXIS 11299 at *13-15; *SEC v. Porto*, 748 F. Supp. 671, 672 (N.D. Ill. 1990).

For the reasons discussed above, the Commission respectfully requests that the Court incarcerate Altomare until he pays the disgorgement and prejudgment interest in full, or proves categorically and in detail that any payment is impossible.

Dated: March 21, 2008

Respectfully submitted,

s/ Leslie J. Hughes
Leslie J. Hughes
Attorneys for the Plaintiff
Securities and Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2008, I electronically filed the **PLAINTIFF'S SUMMARY OF EVIDENCE THAT ESTABLISHES ALTOMARE IS IN CONTEMPT** with the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification to the following as indicated to the parties listed below.

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Dated: March 21, 2008

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